BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

No opinions were rendered in the state courts.

The conviction was affirmed by the Appellate Division of the First Department with a memorandum reported at (1942) 264 App. Div. 917. The affirmance by the Court of Appeals, Lehman, Ch. J., dissenting in a memorandum, is reported at (1943) 291 N. Y. 575.

II

Jurisdiction

1. The statutory provision for jurisdiction in this court is Judicial Code, Sec. 237(b), (28 U. S. C. A. Sec. 344), as amended by the Act of February 13, 1925.

2. The remittitur of the Court of Appeals was dated July 20, 1943, and the petition for writ of certiorari has been filed within 3 months from said date (28 U. S. C. A. Sec. 350).

3. The remittitur of the Court of Appeals certifies that a federal constitutional question involving the "due process" clause of the Fourteenth Amendment was raised before and necessarily considered by the court.

III

Facts of the Case

Petitioner was indicted (R. 3-14) and convicted in the Court of General Sessions of the County of New York,

State of New York, of the crime of perjury in the first degree (R. 13).[2]

The facts and circumstances of the case pertinent to the questions presented to this Court are set forth in the petition, and are omitted here in the interest of brevity.

IV

Argument

To convict the petitioner of the crime charged in the indictment, it was incumbent on the prosecution to prove (1) that the testimony of the petitioner was false, and (2) that it was material. On the issue of falsity, the proof consisted solely of the testimony of three witnesses which was predicated upon their claim, made at the trial, that they had been members of the Communist Party. All three admitted having denied being members of that Party in the course of prior testimony given at private hearings of the Legislative Committee. Their credibility was thus a vital issue.

On this issue, access to minutes of the private hearing was indispensable for proper cross-examination of the People's witnesses. Under the rule of law adopted by the New York courts, petitioner was entitled to the use of such minutes for cross-examination. His right thereto was conceded. The refusal of the Legislative Committee to produce the minutes and the approval of such action by the Trial Court deprived petitioner of the opportunity and right of cross-examination on this crucial issue in the case,—the credibility of the People's witnesses.

1. The right to cross-examine opposing witnesses is a fundamental right included in the concept of "due process" guaranteed by the Fourteenth Amendment to the United States Constitution.

---

[2] N. Y. State Penal Law, Sec. 1620 defines the crime of perjury. Sec. 1620a provides that "A person is guilty of perjury in the first degree who commits perjury as to any material matter * * *."

2. The credibility of the prosecution's witnesses was a crucial issue. It was a proper and under the circumstances, indispensable subject of cross-examination. The action of the Legislative Committee in refusing to produce minutes of the private hearing necessarily denied petitioner the opportunity and right to cross-examine opposing witnesses on this issue and thus deprived him of his liberty without "due process".

3. The action of the Legislative Committee was not justified on any theory of "separation of powers" or "confidentiality" of the minutes.

4. The action of the Legislative Committee constituted an unwarranted interference with the judicial process. The Court was not bound to endorse it. Approval by the Court of the Committee's action denied petitioner the "due process" guaranteed by the Fourteenth Amendment.

POINT I

The right to cross-examine opposing witnesses is a fundamental right inherent in the concept of "due process" guaranteed by the Fourteenth Amendment to the United States Constitution.

The rights of a defendant under the "due process" clause of the Fourteenth Amendment have never been enumerated, but time and circumstance have broadened its meaning. In *Twining* v. *New Jersey* (1908), 211 U. S. 78, 110, this Court said: "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, (citing cases), and that there shall be notice and opportunity for hearing given the parties, (citing cases)." Since that time, it has held that within these rights and fundamental to it is the right to an opportunity to offer evidence (*Saunders* v. *Shaw* (1917), 244 U. S. 317); the right to counsel (*Powell* v. *Alabama* (1932), 287 U. S. 45);

the right to a trial free from mob domination (*Moore* v. *Dempsey* (1923), 261 U. S. 86). Indeed, it has been said:

> "In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life."
>
> (Dissenting opinion of Roberts, J., in *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, 127.)

We assert that the right to cross-examine opposing witnesses is one of those fundamental rights embraced in the meaning of "due process".

A

Recognizing that it is subject to reasonable control by the Trial Court, the fact remains nonetheless that the right of cross-examination is a basic right of a litigant,—an essential to our conception of a fair trial.

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statement is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."
>
> Wigmore on Evidence (3rd ed.), Sec. 1367.

To like effect, see *Alford* v. *U. S.* (1931), 282 U. S. 687, *Heard* v. *U. S.* (C. C. A. 8 Cir., 1919), 255 Fed. 829,[3] and

---

[3] "A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error" (p. 832).

Lindsey v. *U. S.* (Ct. of App., D. of C., 1942), 133 F. (2d) 368.

The fundamental character of the right of cross-examination is recognized by the Federal Constitution. The Sixth Amendment provides in part,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * ; *to be confronted with the witnesses against him* * * * "[4] (Italics supplied.)

A like provision is contained in the Constitution of the State of New York, in Article I, Sec. 6, thereof.

> "No person shall be held to answer for a capital or otherwise infamous crime * * * unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be * * * *confronted with the witnesses against him* * * * " (Italics supplied.)

Similar provisions are contained in the N. Y. State Civil Rights Law, Sec. 12, and the Code of Criminal Procedure of that State, Sec. 8.

The right of confrontation is the right of cross-examination. Thus Wigmore says:

> "There never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names * * * "
>
> Wigmore on Evidence (3rd ed.), Sec. 1397.
>
> "It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and dispensable one;

[4] "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination." *Dowdell* v. *U. S.* (1911), 221 U. S. 325, 330.

(1) the main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination* * * *." Ibid., Sec. 1395.

B

Whether the right of cross-examination as guaranteed in the provision for confrontation in the Sixth Amendment is one of those embraced in the concept of "due process" guaranteed in the Fourteenth Amendment, does not appear to have been specifically passed upon by this Court. However, in *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, this Court in discussing generally the rights embraced within the "due process" clause of the Fourteenth Amendment, by Cardozo, J., said at page 106:

> "Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts (Garner v. Washington, supra, at p. 85), and in prosecutions in the state courts is assured very often by the constitutions of the states. *For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment,* though this has not been squarely held." (Italics supplied.)

This Court divided in that case on the question of whether confrontation entitled a defendant to more than the right of cross-examination,—as to that right the Court appears to have been unanimous.

The right of cross-examination was specifically held to be a part of "due process" in *Walker Mining Co.* v. *Ind. Acc. Comm.* (Dist. Ct. of Appeals, 3 Dist. 1939), 35 Cal. App. (2) 257, 262, 95 P. (2) 188, 190. The Court there said:

> "We are of the opinion the California Industrial Accident Commission exceeded its jurisdiction in submitting and determining the insurer's petition to terminate its liability without permitting it to obtain a medical examination to ascertain the present physical condition of the claimant, and to cross-examine him in that regard. In effect, that ruling amounted to a

denial of the insurer's constitutional right to due process by refusing to permit it to cross-examine a witness upon a material issue."

See also:

Alford v. *U. S.* (1931), 282 U. S. 687.[5]

POINT II

The credibility of the prosecution's witnesses was a crucial issue. It was a proper and under the circumstances, indispensable subject of cross-examination. The action of the Legislative Committee in refusing to produce minutes of the private hearing necessarily denied petitioner the opportunity and right to cross-examine opposing witnesses on this issue and thus deprived him of his liberty without "due process".

A

Petitioner was convicted on the charge of having given false material testimony at a hearing of a legislative committee. Proof of the falsity lay solely in the testimony of three witnesses. No records, no documents, no objective or impersonal evidence was produced to support the testimony of those witnesses. Their testimony was predicated on the claim, made at the trial, that they had been members of the Communist Party at City College (R. 288, 715, 793), and through such membership had become conversant with the matters regarding which petitioner was alleged to have given false testimony.

---

[5] P. 692: "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is *to deny a substantial right and withdraw one of the safeguards essential to a fair trial.*" (Italics supplied.)

Therefore, any doubt that existed as to their membership necessarily cast doubt on all their testimony which flowed from the claim of membership.

In the course of their examination, each of the three witnesses testified to having been called as a witness at a private hearing of the Legislative Committee and at such hearing having denied ever being a member of the Communist Party (R. 369, 735, 802).

The question of the credibility of these witnesses was thus raised by their own testimony in the direct examination. On a fact of controlling importance, they had admittedly testified on a previous occasion in a manner diametrically opposite to what they testified to at trial. The credibility of a witness is not generally brought into question on the examination in chief of a witness; usually it is attacked by cross-examination or adverse witnesses. Here the issue was raised by the prosecution itself. There was no evidence or even suggestion that such prior inconsistent testimony had been prompted in any way by petitioner or that he had any knowledge whatever of such previous testimony. The attempt to impeach the credibility of a witness, customary at all trials, was here made inevitable by the admissions of inconsistent statements on a most vital issue in the case.

B

Petitioner's right to cross-examine the witnesses on the issue of credibility is unquestionable.

Wharton's Criminal Evidence (11 ed.), Secs. 1291, 1340;
Alford v. *U. S.* (1931), 282 U. S. 687, 691, 692;
Dist. of Columbia v. *Clawans* (1937), 300 U. S. 617, 631, 632;
People v. *Becker* (1914), 210 N. Y. 274, 297.

The credibility of witnesses is always an important issue for the jury (Wharton's Criminal Evidence [11th ed.], Secs.

881, 1411). But in prosecutions for perjury, it has been generally recognized that the issue of credibility is of especial significance. The rule was adopted and has been almost universally followed, that no conviction in a perjury case may rest on the uncorroborated testimony of a single witness.

Hammer v. *U. S.* (1926), 271 U. S. 620, 626;
U. S. v. *Woods* (1840), 14 Peters (U. S.) 430, 438;
Cohen v. *U. S.* (C. C. A. 2 Cir. 1928), 27 F. (2d) 713, 714;
Wharton's Criminal Law (12 ed.), Sec. 1585.

It is the doctrine in New York State.

People v. *Evans* (1869), 40 N. Y. 1;
People v. *Stone* (1884), 32 Hun 41, 2 N. Y. C. Cr. 445;
People v. *Doody* (1902), 72 App. Div. 372, aff. 172 N. Y. 165.

The rule is predicated upon the sound reasoning that since the basic question in a perjury trial is the credibility of a defendant, it shall not be determined on the word of another unless that other's credibility is supported by some additional evidence.

Consequently, in the instant case, it being a prosecution for perjury, the credibility of the People's witnesses was a most material issue. In view of their admission of prior inconsistent statements, it became a crucial issue at the trial. A witness may be impeached by proof of prior inconsistent statement (Wharton's Criminal Evidence (11th ed) Sec. 1355). The inconsistent statements of the witnesses were embodied in the minutes of the hearings at which they testified. An effective cross-examination of the witnesses on these contradictions, to afford the jury an opportunity to fairly evaluate their credibility, was possible only by the production of those minutes and an opportunity

to confront them with the prior testimony.[6] They had been examined for some time at the private hearings (R. 490, 754), and we may assume that the testimony they gave there covered much of the matter regarding which they testified at the trial. Petitioner therefore requested that the minutes be produced to be used as a basis for cross-examining the witnesses, if the court found them to be material for that purpose (Deft.'s Ex. F, R. 1669, see Appendix annexed hereto, R. 435 et seq.).

C

Where evidence exists of contradictory statements of a witness, the opposing party has the right to the use of such evidence to impeach the witness (70 Corpus Juris, Witnesses, Sec. 1219; Wigmore on Evidence (3rd ed.) Secs. 1037, 2363). The rule extends to defendants in criminal cases as well.

> Wigmore on Evidence (3rd ed.), Sec. 2224;
> *People* v. *Davis* (1884), 52 Mich. 569, 18 N. W. 362;
> *State* v. *Guagliardo* (1920), 146 La. 949, 84 So. 216;
> *Riggins* v. *State* (1915), 125 Md. 165, 93 Atl. 437;
> *Centoamore* v. *State* (1920), 105 Neb. 452, 181 N. W. 182;
> *State* v. *Archer* (1927), 32 N. Mex. 319, 255 Pac. 396.

It is the rule in England (*Rex* v. *Clarke* (1930), 32 Crim. App. Rep. 58); in the Federal courts (*Heard* v. *U. S.* (C.

---

[6] *People* v. *Becker* (1914), 210 N. Y. 274, at p. 297: "Of course it was proper to show on the cross-examination of this witness that he was testifying against the defendant under an agreement that in consideration of so doing he should be turned free, and if possible wring from him some admission that his testimony was influenced by this great reward, *and for the purpose of such cross-examination defendant was entitled to have the written agreement produced and to have the court so direct its officer, the district attorney. An attempt to conduct a cross-examination based upon its provisions without production of it would have been futile, and speedily would have been forbidden by the court.*" (Italics supplied.)

C. A. 8 Cir. 1919), 255 Fed. 829, *Boehm* v. *U. S.* (C. C. A. 8 Cir. 1941), 123 F. (2d) 791, 807, cert. den. (1942) 315 U. S. 800), and in New York State itself.

> "The rule has long been established that prior contradictory statements, whether made in court under oath or outside of court orally or in writing, may in proper case be introduced to impeach the credibility of a witness." *Roge, Matter of* v. *Valentine* (1939), 280 N. Y. 268, 276.

People v. *Walsh* (1933), 262 N. Y. 140;
People v. *Wargo* (1933), 149 Misc. 461; 268 N. Y. Supp. 400;
People v. *Santorelli* (1930), 228 App. Div. 705;
People v. *Schainuck* (1941), 286 N. Y. 161.

The witnesses having admitted making the prior inconsistent statements, petitioner was entitled to cross-examine them from the minutes themselves.

Heard v. *U. S.*, supra, page 832;
People v. *Becker* (1914), 210 N. Y. 274;
People v. *Schainuck*, supra, page 164.[7]

In the extended colloquy before the Court on the right of petitioner to have the minutes produced, the trial prosecutor conceded that right without hesitation (R. 435, 442).

---

[7] Foot of p. 164: "Here the contradictions between his trial testimony and his story to the Fire Marshal was admitted by the witness. Was that enough? Did the defense have to rest content with that bare showing? Should not there have been an opportunity to compare, detail for detail, the conflicting versions, and to spread them before the jury? As it stands now, the jury heard the implicating testimony at full length and with full detail, but as to the exculpating testimony it heard only the conclusory statement of the witness that his earlier testimony was to the effect that he knew nothing about the fire * * *." P. 165: "We adopt the view that the right to scrutinize prior inconsistent statements cannot be cut off by the mere admission by the witness that he has been guilty of inconsistency."

D

Petitioner accordingly subpoenaed the Legislative Committee to produce the minutes (see Appendix annexed hereto). However, the Committee refused to produce them (R. 437) and the minutes were not made available to petitioner. In spite of repeated urging by the Court (R. 439, 440, 441, 442), the Committee as reported by its counsel, remained steadfast in its refusal (R. 558).

The effect of the Committee's action was to shut off the main line of inquiry by which the petitioner could have challenged the credibility of the People's witnesses. In the absence of the minutes themselves, any inquiry as to the contradictory testimony was rendered futile. *People* v. *Becker* (1914), 210 N. Y. 274, 297 (see footnote 6 of this brief).

The denial of the minutes by the Legislative Committee deprived petitioner of his right to cross-examine the witnesses and hence of the constitutional protection of due process. *Walker Mining Co.* v. *Ind. Acc. Comm.* (Dist. Ct. of Appeals, 3 Dist. 1939), 35 Cal. App. (2) 257; 95 P. (2d) 188.

> "The denial of rights given by the Fourteenth Amendment need not be by legislation." Holmes, J., in *Saunders* v. *Shaw* (1917), 244 U. S. 317, 320.

Moreover, by refusing to produce the minutes, the Legislative Committee deprived petitioner of the opportunity of presenting evidence. This has been held to be a denial of "due process".

> *Saunders* v. *Shaw,* supra;
> *Georgia Ry. & El. Co.* v. *Decatur* (1935), 295 U. S. 165;
> *Walker Mining Co.* v. *Ind. Acc. Comm.,* supra.

POINT III

The action of the Legislative Committee was not justified on any theory of "separation of powers" or "confidentiality" of the minutes.

In the state appellate courts, the district attorney justified the non-production of the minutes (1) on the basis of the doctrine of "separation of powers"; and (2) on the claim that secrecy of the minutes rendered them confidential.

(1) The doctrine of "separation of powers"

The attorney representing the Legislative Committee, who appeared at the trial in response to a subpoena for the production of the minutes served on the Committee, made the following explanation to the court (R. 437):

> "Mr. Shea: Your Honor, the position of the Legislative Committee is that it will respectfully decline to produce, in response to the subpoena, the minutes of the private hearings of Mr. Canning and the other people referred to in the subpoena.
>
> "I would like to make it clear, however, that the Committee's position is not predicated on the private testimony of the three witnesses mentioned; but the Committee's position is that these private records, namely, the private hearing record and other confidential data received by the Committee, cannot be compelled to be produced by the subpoena process; that the Legislative Committee is a branch and an arm of the State Legislature; that it is independent and a co-equal body in the governmental system of this State just as much as the judicial and executive departments."

a

The doctrine of separation of powers is wholly inapplicable. The issue in the case is not the relation between the legislature and the courts—it is the effect upon the petitioner of a particular act of the Legislative Committee, ultimately approved and acted upon by the Court.

The provision of the Sixth Amendment to the Federal Constitution that an accused shall "have compulsory process for obtaining witnesses in his favor" is not a provision defining the power of the court, it is the declaration of a safeguard assured to every accused against individuals and government alike. No similar provision is contained in the New York State constitution, but the relations which the Federal provision suggests applies equally to the right of subpoena whether it flows from statute or custom.

Petitioner was charged with perjury alleged to have been committed at a hearing of the Committee. The prosecution was at its instigation. Its refusal to produce testimony which petitioner claimed would shed light on his innocence is fraught with suspicion and is repugnant to any idea of fair play. The doctrine has therefore been invoked as an attempted justification of conduct otherwise to be condemned as unlawful, prejudicial and offensive to the sensibilities of fair-minded men.

b

However, if the doctrine is involved in the case at all, it is in precisely the opposite form to that contended by the Committee and justified by the district attorney. The argument is made that the Court in issuing a subpoena duces tecum to the Legislative Committee was interfering with its work. In truth, the shoe fits on the other foot. What is presented here is not an interference by the Court in the performance by the legislature of *its* functions under the constitution—but rather an interference by the Legislative Committee with the performance of the Court's constitutional function—the trial of cases with even handed justice under the law.[8]

---

[8] "A fertile source of perversion in constitutional theory is the tyranny of labels." Cardozo, J., in *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, 114.

> "When we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution."
>
> Story's Constitution (5th ed.) 393, cited in *Dreyer* v. *Illinois* (1902), 187 U. S. 71, 84.

The doctrine implies that one department do not encroach upon the functions of the other or interfere with or embarrass any other department in the free exercise of its functions.[9] (See 11 Am. Jur. "Constitutional Law", Sec. 185.)

It borders on absurdity to urge seriously that by requesting the production of the witnesses' testimony at the private hearings of the Committee, for the legitimate purposes of the pending trial, the Court was exercising a legislative function or remotely interfering with the legislative process. The work of the Committee could not conceivably be hampered since the matters regarding which the wit-

---

[9] "The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers'. Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., Sec. 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers'." *Humphrey's Executor* v. *U. S.* (1935), 295 U. S. 602, 630.

nesses had testified to at the private hearings, were the very matters on which they subsequently testified publicly and again at the instant trial.

c

Support has been claimed for the position of the Committee in such cases as *Kilbourn* v. *Thompson* (1880), 103 U. S. 168; *McGrain* v. *Daugherty* (1927), 273 U. S. 135; *Hearst* v. *Black* (Ct. of App., D. C., 1936), 87 Fed. (2) 68, and in the New York cases of *State Educational System* (*Teachers Union*) (1941), 285 N. Y. 1, and *Matter of LaGuardia* v. *Smith* (1942), 288 N. Y. 1. The cases, however, are entirely inapplicable. In all of them recourse was had to the courts to prevent the legislature from carrying out some function related to the legislative process—and this the court refused to do. This is a far cry from a request made to the Legislative Committee to permit the court to carry out the judicial process, and administer justice.

On the other hand, courts have not been hesitant to prevent the Legislature from exceeding its authority and interfering with the rights of citizens. Thus, it prevented examination of a witness by a congressional committee on private matters beyond its authority in *Kilbourn* v. *Thompson,* supra, and the exercise of the power of contempt without constitutional justification in *Marshall* v. *Gordon* (1917), 243 U. S. 521. (Compare also *Reeve* v. *Howe et al.* (D. C., E. D. Pa., 1940), 33 F. Supp. 619.)

Nor have they been hesitant to strike down legislation that attempted to invade or interfere with the judicial process that legitimately belongs to the courts alone.

In re Handley's Estate (1897), 15 Utah 212;
Davis v. *Menasha* (1867), 21 Wisc. 497;
Ratcliffe v. *Anderson* (1878), 31 Grattan (Va.) 105, 31 Am. Rep. 716;
Marpole v. *Cather's Admr.* (1883), 78 Va. 239;
Minn. ex rel. Flint v. *Flint* (1895), 61 Minn. 539;
Matter of Siblerud et al. (1921), 148 Minn. 347.

See particularly:

Matter of Dauphin Co. Grand Jury Investigation Proceedings (No. 2) (1938), 332 Pa. 342.

d

Immunity of the Committee from Process

As a corollary to the substantive argument on separation of powers, counsel for the Legislative Committee suggested that it was not subject to the subpoena process (R. 437).

> "For more than three centuries it has now been recognized as a fundamental maxim that the public has a right to every man's evidence."
>
> Wigmore on Evidence (3rd ed.), Sec. 2192.
>
> "This testimonial duty to attend and disclose all that is needed for the ascertainment of truth applies to *every form and material of evidence* whatever.
> "In particular it applies to such evidential material as exists in a person's hands in the form of *documents.*"
> Ibid., Sec. 2193.

Applying these fundamentals to the chief executive, Wigmore continues (Sec. 2370):

> "Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of *Chief Executive* of a State?
> "There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice. The general principle of testimonial duty to disclose knowledge needed in judicial investigations is of universal force. It does not suffer an exemption which would be irrespective of the person's knowledge and would rest wholly on the nature of the person's occupation. This duty, and the equal application to the Executive and subordinate officers, has perhaps never been doubted."

Whatever rule or logic applies to the Chief Executive undoubtedly applies with equal force to the Legislature and certainly to one of its committees.

Furthermore, distinction must be drawn between exemption from process requiring personal attendance and the duty to furnish evidence (Wigmore, ibid., Sec. 2372). Though it should be pointed out that the vice-chairman of the Committee raised no question of immunity about attending in person and being a witness at the trial in behalf of the prosecution (R. 163-170).

Whether or not obedience to the process could be enforced is no reason for the Court to yield its right to issue it.

> "It cannot be denied that to issue a subpoena to a person filling the exalted station of Chief Magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the Court can have no choice in the case. If then, as is admitted by the counsel for the United States, a subpoena may issue to the President, the accused is entitled to it of course; and, whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it." Marshall, C. J., in Aaron Burr's Trial (1807).
>
> Cited in Wigmore on Evidence (3rd Ed.), Sec. 2371, page 740.

The courts of New York State itself have issued process to Legislative Committees and have exercised jurisdiction in applications to quash subpoenas issued by or under direction of such committees.

Peo. ex rel. Hastings v. *Hofstadter* (1932), 258 N. Y. 425;

Herlands v. *Surpless* (1914), 171 Misc. 914, aff. 258 App. Div. 275, aff. 282 N. Y. 647;

Matter of State Educational System (*Teachers Union*) (1941), 285 N. Y. 1; (involving the Legislative Committee concerned in this case);

Matter of LaGuardia v. *Smith* (1942), 288 N. Y. 1.

Similarly, process was issued to a congressional committee in *Hearst* v. *Black* (1936), 87 F. (2d) 68.

(2) The doctrine of the right of secrecy

It is claimed further that the testimony having been taken at a private hearing was confidential and the Committee had a right to keep it secret. This is urged on grounds of general legal principles and on a specific resolution of the Committee itself. Counsel for the Committee read into the record a resolution which had been adopted by the Committee providing that (R. 558-559):

> "* * * no testimony given by any witness at a private hearing shall be divulged to any person other than a member of the committee or any employee thereof without the consent of the witness by the Committee, or any member thereof or any of the Committee's agents, employees or counsel or the reporter or stenographer making the record thereof, * * *"

except for purposes of proceedings against such witness or to correct or impeach his testimony.

So far as the resolution is concerned, there is nothing in the record to show that the witnesses had refused consent to the production of the testimony. They were never asked because the Committee chose to act peremptorily and so far as appears, without consultation with the witnesses. Moreover, the prohibition of the resolution that "no testimony * * * shall be divulged to any person" can hardly be interpreted to extend to a court in the exercise of its constitutional function. Indeed, says Wigmore, "any *statute* declaring in general terms that official records are confidential should be liberally construed to have an implied exception for disclosure when needed in courts of justice" (Wigmore on Evidence (3rd ed.), Sec. 2379 (2)).

The reasons that have prompted the holding of documents of state or military secret secure against disclosure are inapplicable here. In fact, whatever motives (whether

the protection of the witness or the avoidance of publicity as to the committee's activities) induced the private hearings, their purpose could no longer be served by the withholding of the testimony. Firstly, all of the witnesses had already testified at public hearings after the private ones; they were now testifying publicly at the trial; the subject matter of their testimony on all three occasions was substantially the same. Secondly, whatever latent possibility existed that the minutes might disclose inquiry along lines other than that pursued at the trial, which the Committee would not want divulged, the Committee's counsel was assured by the court that under the rule of *People* v. *Walsh* (1933), 262 N. Y. 140, he would first examine the minutes and then make available to petitioner only such parts of the testimony as appeared to be material.

> " * * * Then, after I examine them, only to be turned over to counsel for the defendant if I find substantial contradictions between the testimony given by the witness here and the testimony as given before the Committee; that is, at its private hearings" (R. 439).
>
> "I merely say to you, I am asking Mr. Shea to take up with his Committee the question of submitting the transcript of the witness' testimony so that the Court may examine it, and then determine whether or not it should be turned over to you, as counsel for the defendant" (R. 442).

Finally, it is submitted that whether or not the minutes were entitled to the privilege of secrecy was a question for the Court to determine and not the committee.

> "So far as the privilege (of state secrecy) has legitimate scope, it raises the question how the existence of the facts which make it applicable is to be determined. * * * Who shall make this determination?
>
> "Obviously, and by analogy with other privileges, the Court * * *.
>
> "The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportuni-

ties for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and this has been insisted upon by the highest judicial personages both in England and the United States."

Wigmore on Evidence (3rd ed.), Sec. 2379 and cases cited.

POINT IV

The action of the Legislative Committee constituted an unwarranted interference with the judicial process. The Court was not bound to endorse it. Approval by the Court of the Committee's action denied petitioner the "due process" guaranteed by the Fourteenth Amendment.

As discussed heretofore, petitioner was entitled to have the minutes of the prior contradictory testimony of the People's witnesses produced by the Legislative Committee. In aid of that right, the Court issued its subpoena to the Committee, directing the production of the minutes (see Appendix).

When the Committee demurred, the Court attempted to persuade it, through its counsel, to reconsider and obey the subpoena (R. 439, 440, 442). After apparent reconsideration, the Committee adhered to its refusal to produce the minutes (R. 558).

The action of the Committee was thus an interference with the judicial process (a) in that it was contemptuous of the Court, and (b) in that it deprived petitioner of the opportunity to cross-examine, a right fundamental to the judicial process. It hampered, hindered and seriously em-

barrassed the Court in the exercise of its function of trying cases, for it prevented the Court from extending to petitioner, the constitutional right of cross-examination to which he was entitled. The doctrine of separation of powers confers no such power in the Legislature to interfere with and prevent the judicial process.

> "The three departments being invested with the entire sovereignty of the people, and constituting the State government, are not so independent of each other as that those in authority in one department can ignore and treat the acts of those in authority in another department, done pursuant to the authority vested in them, as nugatory and not binding on every department of the State government."
>
> *Board of Commissioners of White County* v. *Gwin, Sheriff* (1893), 136 Ind. 562, 585.

Administration of justice must not be paralyzed by "the fetich of some implacable tenet, such as that of the division of governmental powers", Cardozo, The Nature of the Judicial Process (1928), p. 148. See also, *Wilson* v. *U. S.* (C. C. A. 3rd, 1932), 59 F. (2) 390, 392, "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled"; *Centoamore* v. *State* (1920), 105 Neb. 452, 455, 181 N. W. 182, 183, "The determination of the question of guilt or innocence of the accused is of so great importance that the accused should not be denied the right to produce such material testimony, available and within his reach, merely from the fact that there are reasons of public policy why the communication, which has become the very basis of the charge made against him, should not be disclosed."

The Court is not powerless to act because in a given case, its process does not produce the required evidence.[10] It is not obliged to permit injustice or an unfair trial because the non-cooperation of a coordinate branch of government prevents it from doing justice and insuring a fair trial.

Despite such effect of the Committee's behaviour, the Court ruled, over petitioner's objection, that the Committee was within its rights in refusing to produce the required minutes (R. 626). To this ruling, petitioner duly excepted (R. 626).

By approving the decision of the Committee, the Court deprived petitioner of the opportunity for cross-examination, which was a denial of "due process". The court is not bound to follow the unlawful, unwarranted and prejudicial conduct of the legislature or its committee.[11]

It has long been the law that when cross-examination is made impossible through no fault of the opposing party, the examination-in-chief must be stricken out.

> Abbott, Criminal Trial Practice (4th ed.), Sec. 312, p. 572;
>
> *People* v. *Cole* (1871), 43 N. Y. 508.

"No injustice is done to the party seeking to avail himself of the evidence to require, that, before its

---

[10] Note from Wigmore on Evidence (3rd ed.), Sec. 2371, note 4: "1800 U. S. v. Cooper, Whart. St. Tr. 659, 10 Amer. St. 774,783 * * * 'the accused also desired to compel the attendance of several members of the Congress, then in session, and "asked the Court to address a letter to the Speaker of the House, requesting him to have the process served; Judge Peters thought this the proper course; Judge Chase ordered process to issue without such letter, saying that if it was necessary to compel the attendance of the members the case would be continued until the session was over" '."

[11] Compare e. g. statement of Pres. Roosevelt on Urgent Deficiency Appropriation Act, 1943, appearing in Congressional Record, Senate, Sept. 14, 1943, Vol. 89, No. 132, p. 7600: "This rider is an unwarranted encroachment upon the authority of both the executive and the judicial branches under our Constitution. It is not, in my judgment, binding upon them."

admission, its truth shall be subjected to such tests as the experience of ages has shown were necessary to render reliance thereon at all safe, and where this has been prevented without any fault of the adverse party, to exclude the evidence" (p. 513).

State v. *Bingham* (1926), 133 S. C. 491, 131 S. E. 603;

70 Corpus Juris, Witnesses, Sec. 788, p. 618.

Having established that denial to petitioner of the right to cross-examine witnesses from these minutes denied him a trial by "due process", it is immaterial whether the source of such denial was the Court or the Committee. The constitutional inhibition of the Fourteenth Amendment is directed to the state, which includes all its agencies—the courts, the executive and the legislative, alike.

"A State acts by its legislature, its executive, or its judicial authorities. * * *

"Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

Ex parte Virginia (1879), 100 U. S. 339, 347.

CONCLUSION

The substantial question of "due process" involved in this application is of particular importance in that it was precipitated by action of a Legislative Committee. Great concern has been expressed of the dangers to democratic government in the growing inquisitorial character of such committees.[12] The action in the instant case was a further

[12] See, The Inquisitorial Power of Congress by Bryce L. Hamilton, Journal of Amer. Bar Assn., July 1937, Vol. 23, p. 511.

expression of disregard for traditional and constitutional safeguards for persons accused of crime or other wrongdoing.

This Court in the exercise of its supervisory power should grant a writ of certiorari to review and revise the judgment in this action now pending in the Court of General Sessions of the County of New York.

Respectfully submitted,

JOSEPH R. BRODSKY,
Attorney for Petitioner.

October 15, 1943.